Supreme Court, U. S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, 1979

No. 78-1312

ALLEN H. SMITH,

Petitioner,

VS.

COUNTY OF YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ALLEN H. SMITH
Attorney-at-Law

47 North Duke Street
York, Pennsylvania 17401
717-854-6609

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 237, PHILADELPHIA, PA. 19103
PHONE: (215) 568-7703

INDEX.

	Page
Opinions by Lower Courts	1
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented for Review	3
Statement of the Case	5
Argument	6
I. Petitioner was deprived of due process when the local Court Judges failed to recuse themselves, and the local Court failed to give Petitioner a hearing on the issue of disqualification	6
II. The Court erred interpreting Section 1555-2 of the County Code so as to apply to agents, when the Statute used the term County Officers, and in so doing impaired the obligation of existing contracts between your Petitioner and the State and Local Municipalities	10
III. The Appellate Court deprived your Petitioner of substantive due process in determining that the local Court had jurisdiction of a declaratory judgment proceeding, when the Appellate Court failed to follow the standard they laid down in prior cases	12
Conclusion	15
Appendix I—Opinion in the Court of Common Pleas of York County, August 27, 1976	16
Order	22

Page

Appendix II—Opinion of the Commonwealth Court of Pennsylvania, July 28, 1978 24

Order 29,30

Appendix III—Opinion of the Supreme Court of Pennsylvania, December 29, 1978 31

TABLE OF CASES.

Capital Bank & Trust Company's Petition, 336 Pa. 108, 6 A2d 790 13

Commonwealth of Pennsylvania v. Donald E. Swope, 580 May Sessions 1974 —York County 8

Dartmouth College v. Woodward, 4 Wheat 518, 4 L Ed 629 9

Friestad v. Travelers Indemnity Co., 452 Pa. 417, 306 A2d 295 14

George W. Atkins, *et al.* v. County of York, 14 May Term 1973—York County 7

Greenburg v. Blumburg, 416 Pa. 226, 206 A2d 16 5,14

Hadley's Case, 336 Pa. 100, 6 A2d 874 10

In Re: Act No. 113—235 of 1971, M.D. (Lawrence County) 3,8,13

In Re: Johnson's Estate, 493 Pa. 476, 171 A2d 518 .. 14

Schoenbrun v. Nettrour, 360 Pa. 474, 61 A2d 868 13

Waiabus Agr. Co. v. Maneja, C. C. Hawaii, 216 F 2d 466, 75 S. Ct 719 15

Wilshire v. Penn Overall Supply Co., 227 Pa. Superior Ct. 30, 323 A2d 239 14

Page

STATUTES.

County Code by the Act of January 25, 1966, P.L. 1556, Section 3 (16 P.S. 1555-2) 3,5,10,11

53 P.S. 306 11

53 P.S. 46101 11

53 P.S. 56502 11

53 P.S. 65570 11

Title 16 of Purdons Pennsylvania Statute Annotated as Section 11011-1 *et seq.* 3

Section 6 of the Uniform Declaratory Judgments Act, as amended, by the Act of April 25, 1935, P.L. 72 and again by the Act of May 26, 1943, P.L. 645 and by the Act of July 25, 1963, P.L. 305 12,14

CONSTITUTIONS.

Pennsylvania Constitution:

Article I, Section 17 12

Article 3, Section 13 (now Article 3, Section 27) ... 10,13

Article IX, Section 4 3,13

United States Constitution:

Article I, Section 10 2,12

Amendment V 2,9

Amendment XIV, Section 1 2,9

MISCELLANEOUS.

12 Am Jur 267 9

26 C.J.S. Section 45 15

Vol. 48 C.J.S. page 1039 9

Canon 3 of Code of Judicial Conduct 7,8

Constitutional Law, Section 573 9

Summary of Pennsylvania Jurisprudence, Constitutional Law, Section 366 9

IN THE

Supreme Court of the United States

..... Term, 1979

No. .....

ALLEN H. SMITH,

Petitioner,

vs.

COUNTY OF YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Opinions by Lower Courts

1. August 27, 1976; Opinion and Order of York County Court.

2. July 28, 1978; Opinion of the Commonwealth Court of Pennsylvania affirming York County Court Opinion and Order.

3. December 29, 1978; Opinion of the Supreme Court of Pennsylvania refusing to Allow Appeal from Opinion of the Commonwealth Court of Pennsylvania.

Jurisdiction

The judgment sought to be reviewed was rendered by the Commonwealth Court of Pennsylvania on July 28, 1978 (County of York v. Allen H. Smith, 388 A2d 1149 (1978)). Title 28 of the United States Code Sect 1257 (8) confers jurisdiction on this Honorable Court where the highest Court of the state renders a final judgment where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

This case was decided by the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, which is the highest and final appellate Court in the Commonwealth refused to grant allocatur.

The instant case involves the invocation of the Fifth Amendment of the United States Constitution and likewise the Fourteenth Amendment (making the Fifth Amendment applicable to the several states). The instant case also involves the impairment of the obligation of contracts, Article I, Section 10 of the Federal Constitution.

Constitutional Provisions Involved

Amendment V:

"No person shall be . . . deprived of life, liberty or property, without due process of law, . . ."

U.S.C.S. --- Constitution, Amendment, 5-End, page 1

Amendment XIV, Section 1:

". . .; nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

U.S.C.S. --- Constitution, Amendments 5-End, page 444.

Article I, Section 10

"No state . . . shall pass any . . . law impairing the obligations of contracts. . ."

Questions Presented for Review

The Petitioner was Recorder of Deeds in and for York County, Pennsylvania. He was also an agent for the Commonwealth of Pennsylvania and for local municipalities for the collection of realty transfer taxes. As an agent he was entitled to a commission for collecting of these monies.

On April 23, 1968, the Pennsylvania Electorate adopted the present Article IX, Section 4 of the Pennsylvania Constitution which govern the subject of *salary* and *fees* for County Officers. Pursuant to the schedule at the end of Article IX, that amendment became effective November 1, 1971, when the Pennsylvania Legislature enacted Act 113 of 1971, which now appears in Title 16 of Purdons Pennsylvania Statute Annotated as Section 11011-1 *et seq.* Act 113 of 1971 makes reference to *fees and commissions*. Prior to all this, Section 1555-2 had been added to the County Code by the Act of January 25, 1966, P.L. 1556, Section 3 (16 P. S. 1555-2) which limited commissions that can be paid to a *County Officer* to $7,500.00 annually.

On May, 1973, the County of York filed an Equity Action seeking a Declaratory Judgment as to the salary and fees to which the Recorder of Deeds was entitled.

Appellant sought an order disqualifying all members of the York County Court since he was both a member of the York County Bar and a County Official. The order was refused and the case was assigned to a Panel of two Judges from the County to determine the matter. No hearing was ever granted on the Petition presented to the Court for the local Court Judges to recuse themselves. Appellant appealed to the upper Courts alleging a denial of due process.

The questions presented are:

(1). Where a member of a local bar who is also a county officer is involved in litigation with the County Commissioners over entitlement to commissions, and the same County Commissioners are Defendants in litigation with all the Judges in the same county over another issue, is Petitioner entitled to a *hearing* on the issue of whether the local Judges should recuse themselves and is Petitioner entitled to a specially presiding Judge or Judges since he is both a local attorney and a county official?

(2). Where a Recorder of Deeds has a contract with the State and local municipalities to collect transfer taxes and to retain a commission for doing so, and where both the State and Local Municipalities have existing legislation permitting the collection of those taxes and the payment of commissions for so collecting, may the legislature pass a statute limiting the amount of commissions a County Officer may collect in violation of existing contracts which the said Recorder of Deeds had with both the State and Local Municipalities?

(3). Where a Declaratory Judgment Statute provides that before a Court may assume jurisdiction, a Court must be satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, and the Petition for Declaratory Judgment did not set forth the existence of an actual controversy or antagonistic claim which indicates imminent and inevitable litigation, was the deficiency cured when appellant (Petitioner) raised no exceptions to a pre-trial order, when the law of Pennsylvania is clear that parties accepting assumption by the Court of Common Pleas of jurisdiction of the Action was not controlling and the question of the

availability of such action was still required to be determined by the Appellate Court on Appeal (Greenburg v. Blumburg, 416 Pa. 226.), did the determination by the Appellate Court that the Petitioner accepted jurisdiction of the Court by not objecting to the pre-Trial Order, violate substantive due process in view of the existence of the law as set down by Greenburg v. Blumburg?

Statement of the Case

Your Petitioner was Recorder of Deeds for York County, Pennsylvania and was also an agent for the Commonwealth of Pennsylvania and local municipalities for the collection of transfer taxes on real estate.

During his term of office, there was a change in the Pennsylvania Constitution and the County filed a Petition for Declaratory Judgment to determine the salary and commissions for the Recorder of Deeds. Only constitutional issues were raised in the Petition for Declaratory Judgment. During the course of litigation, the County raised the applicability of Section 1555-2 of the County Code as a limitation on the amount of commissions that the Recorder could receive.

Your Petitioner objected to the local judges hearing and determining the question of his salary and commissions because your Petitioner was a member of the local bar, was a county official and the Judges themselves were then suing the County Commissioners on another matter important to them. Your Petitioner presented a Petition to the County Court asking all local judges to recuse themselves and to appoint specially presiding jurist. This Petition was refused without granting Petitioner a hearing. Petitioner alleges that this was a violation of procedural due process and that he was further

deprived due process when local judges heard and determined his salary and commissions due.

Your Petitioner further alleges that the Courts had no right to limit his commissions in violation of existing contracts with the State and Local Municipalities based on existing legislation, and that such was the impairment of the obligation of contracts.

Further your Petitioner alleges that he was deprived of substantive due process when the Appellate Courts determined that the local Court had jurisdiction to hear the declaratory judgment matter when there was no case or controversy alleged, and that the Appellate Court violated existing state law in so holding.

ARGUMENT

I. Petitioner was deprived of due process when the local Court Judges failed to recuse themselves, and the local Court failed to give Petitioner a hearing on the issue of disqualification.

Appellant at the very inception of the declaratory judgment proceedings presented a formal Petition to the President Judge of York County requesting that York County Judges disqualify themselves from this case. The position of the Appellant was that having been a member of the York County Bar for more than a decade and being the incumbent Recorder of Deeds that a matter involving the County and himself should be heard by an out of county jurist to avoid the possible claim by either party to the action of prejudice.

Canon 3 of Code of Judicial Conduct provides:

"C. Disqualification

(1) A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * * * *

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;"

* * * * *

At the time of the filing of the Petition for Declaratory Judgment by the County of York against Appellant, there existed in York County, Pennsylvania a suit filed by all five of the York County Jurists against the County Commissioners of York County. This was George W. Atkins, *et al.* vs. The County of York, No. 14 May Term, 1973. The said suit had been filed on March 8, 1973. The suit by the County of York against Appellant was filed on May 7, 1973. The suit by the Jurists against the County Commissioners involved a delineation of authority between the judicial and executive branches of government in York County. The action in No. 14 May Term, 1973 was discontinued on May 11, 1976 by the Plaintiffs.

The York County Judges did have an "interest that could be substantially affected by the outcome of the proceedings."

The termination of the Declaratory Judgment proceedings No. 1 August Term, 1973 adversely to the County of York could have affected the outcome of the proceedings by the five Jurists of York County, Pennsylvania against the County of York. For this reason, if none other, the Jurists in York County should have recused themselves in County of York vs. Allen H. Smith.

In Lawrence County, there was a declaratory judgment proceeding by the County Commissioners against the County Controller, No. 235 of 1971 (*In Re:* Act No. 113). In that case the Honorable William W. Caldwell of the Twelfth Judicial District was appointed specially to preside.

In the case of Commonwealth of Pennsylvania vs. Donald E. Swope, No. 580 May Sessions, 1974, an out of county jurist was appointed to preside at the trial of Donald E. Swope, who was a member of the York County Bar.

Appellant maintains that his request for an out of county jurist to determine the Declaratory Judgment proceedings instituted against him was a fair and proper one and for the President Judge to have failed to recuse himself and other members of the Bench of York County was a violation of Judicial discretion, Canon 3, *supra* and procedural due process. To refuse the prayer of the Petition without a hearing was a further violation of procedural due process.

Appellee argues that the appellant has the burden of showing prejudice. How can appellant rise to meet this burden when the Court dismissed the Petition of Appellant without a hearing?

"In order that a litigant may properly be said to have been afforded his day in court, all of the following requisites must be satisfied:

(1) he must have due notice of the pendency of the proceedings.

(2) he must have been afforded a reasonable opportunity for a fair and impartial hearing of his claim or defense.

(3) the tribunal adjudicating the matter must be impartial and purport to adjudicate the matter on a consideration of the law and the evidence.

If any of these elements are lacking, the proceeding lacks the attributes of a judicial determination and must be regarded as a judicial usurpation and oppression inconsistent with the fundamental concepts of impartial justice. Such proceedings have been regarded as violative of 'the law of the land' ever since the days of the Magna Charta, and even earlier. The federal constitutional provisions prohibiting both the federal and state governments from depriving any person of his life, liberty or property without due process of law makes the above principal one of the fundamental rights of liberty, guaranteed by the Constitution. 12 Am Jur 267, Constitutional Law Sect 573; Dartmouth College v. Woodward (1819, US) 4 Wheat 518, 4 L ed 629". Summary of Pennsylvania Jurisprudence, Constitutional Law, Section 366. (Fifth and Fourteenth Amendments of Federal Const.)

"The underlying principal of rules for disqualification of Judges is that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge, . . ." Vol 48 C.J.S. page 1039.

II. The Court erred interpreting Section 1555-2 of the County Code so as to apply to agents, when the Statute used the term County Officers, and in so doing impaired the obligation of existing contracts between your Petitioner and the State and Local Municipalities.

Section 1555-2 of the County Code is applicable to *County Officers* but *not agents* of the Commonwealth of Pennsylvania and not agents of local municipalities.

Section 1555-2 of the County Code provides:

"Each county officer shall pay all commissions received by him from the Commonwealth of Pennsylvania and from any political subdivision in excess of seven thousand five hundred dollars ($7,500.00) in any calendar year to the general fund of the county for the use of the county." Act of January 25, 1966, P.L. 1556, Section 3, 16 P.S. 1555-2. The above Act effects only County Officers and commissions they receive while acting in the capacity of a county agent.

The Pennsylvania Supreme Court has consistently ruled that when an elected official collects fees or commissions as an agent of the Commonwealth, he does so as an *agent* and not as a public officer within the meaning of Article 3, Section 13 of the Pennsylvania Constitution (now Article 3, Section 27) Hadley's Case 336 Pa. 100.

The Statutory Construction Act, 46 P.S. 552, provides:

In assertaining the intention of the Legislature in the enactment of a law the Courts may be guided by the following presumptions among others:

* * * * *

(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth.

* * * * *

If the Legislature had meant that statute to mean "agents" it would have said so. Certainly the Legislature is aware of the distinction, as are the Courts. To interpret the words "county officer" to mean "agent" is an interpretation which results in the taking of property from Appellant without proper legislative enactment. It is a taking of property without due process of law.

Further, if Section 1555-2 is to be construed to mean "agent" then this would violate the authority of municipalities to appoint a tax collecting agent and fix the compensation therefor. See 53 P.S. 56502 which authorized first class townships to appoint a municipal agent and to fix his compensation; 53 P.S. 65570 for Second class townships; 53 P.S. 46101 for Boroughs; 53 P.S. 306 for cities.

Section 1555-2 does not affect the legislation referred to above which allows townships, boroughs and cities to appoint their own agents. The enabling legislation of the municipalities has not been affected specifically by Section 1555-2, and the municipal agent who collects commissions on the realty tax is not affected by the $7,500.00 limitation.

Appellant was an agent for the Commonwealth of Pennsylvania and as agent for the local municipalities.

Such an interpretation of Section 1555-2 of the County Code, without the repealing of statutes authorizing the appointment by local municipalities of a tax collecting agent, would impair the contract existing between the Appellant and the local municipalities and would violate the federal and state constitutional restrictions which forbid the enactment

of "laws" which impair the obligations of contract. Article I, Section 10 of the Federal Constitution; Article I, Section 17 of the Pennsylvania Constitution.

III. The Appellate Court deprived your Petitioner of substantive due process in determining that the local Court had jurisdiction of a declaratory judgment proceeding, when the Appellate Court failed to follow the standard they laid down in prior cases.

Section 6 of the Uniform Declaratory Judgements Act, as amended by the Act of April 25, 1935, P.L. 72 and again by the Act of May 26, 1943, P.L. 645 and by the Act of July 25, 1963, P.L. 305 now provides:

"Relief by declaratory judgment or decree may be granted in all civil cases where (1) an acutal controversy exists between contending parties or (2) where the Court is satisfied that antagonistic claims are present between contending parties or (2) where the Court is satisfied that antagonistic claims are present between the parties involved which indicated imminent and inevitable litigation, or (3) where in any such case the Court is satisfied that a party asserts a legal relation, status, right, or privilege in which he has a concrete interest and that eighth (i) there is a challenge or denial of such asserted relation, status, right or privilege by an adversary party who also has or asserts a concrete interest therein, or (ii) that there is an uncertainty with respect to the effect of such asserted relations, status, right or privilege upon the determination of any tax imposed or to be imposed by any taxing authority, including the United States, any state and any political subdivision thereof, and the Court is satisfied also that a declaratory judgment or decree will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinarily legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present; but proceeding by declaratory judgment shall not be permitted in any case where a divorce or annulment of marriage is sought."

The vital factor in the assumption of jurisdiction is the presence of antagonistic claims indicating imminent and inevitable litigation, coupled with a clear manifestation that the declaration sought will be a practical help in ending the controversy, Capital Bank & Trust Company's Petition, 336 Pa. 108, 111, 1939 Schoenbrun v. Nettrour, 360 Pa. 474.

The Petition for Declaratory Judgment filed by the County of York merely recited the fact of a change in the county classification during the Recorder of Deeds' term of office, the amendment of Article 9, Section 4, of the Pennsylvania Constitution during the Recorder's tenure, the fact of the passage of Act No. 113 of 1971 to implement the amended Article 9, Section 4 of the Pennsylvania Constitution, the existence of Article 3, Section 27 of the Pennsylvania Constitution prohibiting increases or decreases in one's salary or emoluments during his term of office and that fees incidental to the conduct of his office were being held in escrow by him for the period April 23, 1972 to December 31, 1972. The Petition thereupon requests the Court to determine questions concerning salaries and fees.

Nowhere in the Petition is there any statement expressed or implied of a controversy claim or asserted legal right or the

ripening seeds of a controversy. There was merely a request for an advisory opinion.

A Declaratory judgment must not be employed for a determination of rights in anticipation of an event which may never occur or in consideration of moot cases or as a medium for rendition of advisory opinion. *In re:* Johnson's Estate, 493 Pa. 476.

Appellant never joined, in asking for a declaratory judgment. Even if both Appellant and Appellee had joined in asking for such a judgment, the availability of a declaratory judgment must be determined by the Appellate Court on appeals. Greenburg vs. Blumburg, 416 Pa. 226. The fact that both parties "accepted" assumption by the Court of Common Pleas of jurisdiction of the action for declaratory judgment was not controlling and the question of the availability of such action was still required to be determined by the Appellate Court on appeal. Greenburg v. Blumburg, *supra.*

The declaration of August 27, 1976 by the Court of Common Pleas of York County claims authority for jurisdiction in the instant case, based on Friestad vs. Travelers Indemnity Co., 452 Pa. 417 (1973); and Wilshire vs. Penn Overall Supply Co., 227 Pa. Superior Court 30 (1974). A careful reading of these cases will reflect only the legal principal that the existence of another remedy would not preclude the use of declaratory judgment procedure. These cases do not set aside the requirements of Section 6 of the Uniform Declaratory Judgments Act.

Appellee maintains that the right to hear this matter was discretionary with the lower Court. Appellant disagrees. Appellant believes either that the Court did or did not have jurisdiction to hear the matter. It is not a matter of discretion.

Even assuming, *arguendo*, that the matter is one for the discretion of the Court, it has been held that an attempt to settle a constitutional question in an action for a declaratory judgment is an abuse of discretion, Waiabus Agr. Co. v. Maneja, C.C. Hawaii, 216 F2d 466; 75 S. Ct. 719; 349 U.S. 254. See 26 C.J.S. Section 45. Appellee's entire Petition revolved around Constitutional questions.

Conclusion

Your Petitioner prays your Honorable Court to issue a writ of certiorari to the Pennsylvania Supreme Court in that the said Court erred as set forth in the within Petition.

Respectfully submitted,

ALLEN H. SMITH,
Petitioner.

APPENDIX I

Opinion in the Court of Common Pleas of York County, August 27, 1976

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COUNTY OF YORK

vs

ALLEN H. SMITH

Civil Action - Law
No. 1 August Term, 1973
In Equity
(Filed August 27, 1976.)

OPINION

APPEARANCES:

LEWIS P. STERLING, ESQUIRE, For the Petitioner.

ALLEN H. SMITH, ESQUIRE, For the Respondent.

The County of York filed this action against Allen H. Smith, Recorder of Deeds, seeking a declaratory judgment to determine the salary and fees to which he was entitled by virtue of such office. The case was assigned to the undersigned as a panel of Judges to act on behalf of the Court *en banc*. As the facts were not in dispute, it was agreed that the legal issues would be argued and that the Court would enter a final decree as opposed to the usual procedure of a decree *nisi* and

this understanding was set forth in a Pre-Trial Order. The Court entered its opinion in the matter by declaration dated June 18, 1975. The Respondent filed certain exceptions which were challenged by virtue of the aforesaid understanding. After further argument, the Court modified the prior declaration to enter the same in the form of a decree *nisi*. The exceptions are now before the Court *en banc* on their merits. This Opinion is written on behalf of the Court *en banc*.

The facts established by stipulation are set forth at length in the aforesaid Opinion and are incorporated herein by reference. To summarize the essential points, the Respondent on November 4, 1969 was elected to a four year term as Recorder of Deeds for York County which term began January 1, 1970 and ended December 31, 1973. On April 23, 1968 the Pennsylvania Electorate adopted the present Article IX, Section 4 of the Pennsylvania Constitution which govern the subject of salary and fees for county officials. Pursuant to the schedule at the end of Article IX, that amendment became effective November 1, 1971 when the Pennsylvania legislature enacted Act 113 of 1971 which now appears in Title 16 of Purdons Pennsylvania Statutes Annotated as Section 11011-1, *et seq.* Prior to all this, Section 1555-2 had been added to the County Code by the Act of January 25, 1966, P.L. 1556, Section 3 (16 P.S. 1555-2) which limited commissions that can be paid to a county officer to $7,500 a year.

The Court in its prior declaration held (a) that the Respondent was not entitled to an increase in annual salary paid to him by the County of York during the term of his office, (b) that neither the constitutional amendment nor Act 113 applied to him during the term which commenced before either became effective, and (c) that the 1966 amendment to the

County Code did apply and did limit the commissions to which Respondent was entitled.

Respondent's 3rd exception has been rendered moot and his 5th exception has been abandoned. His other exceptions can be conveniently grouped into eight issues which we resolve as follows:

I

In his 1st exception, Respondent objects to the form of the Opinion and Declaration alleging that findings of fact and conclusions of law must be set forth in numbered paragraphs.

The Courts have held that the narrative form is satisfactory *Omranin vs Hasler*, 8 Pa. Commonwealth CT. 224 (1973).

II

Respondent's 2nd exception deals with the alleged unconstitutionality of Act 113 of 1971.

In our opinion this issue is not germane as the Court held, and continues to hold, that said Act does not affect compensation for the term at issue by virtue of Article III, Section 27 of the Pennsylvania Constitution which provides that no law shall increase or diminish a public official's salary or emoluments after his election.

III

Respondent's 4th, 6th, and 10th exceptions question the right of Petitioner to obtain a declaratory judgment.

To the extent that this objection is procedural, the Respondent has waived the same by failing to file any objections until

after the declaration was filed. To the extent that these exceptions question jurisdiction, which cannot be waived, they are overruled. The Court has finally reversed earlier decisions restricting the right to declaratory relief and more recently has construed this remedial statute liberally as intended for the purpose of settling uncertainty and insecurity with respect to rights, status, and other legal relations. See *Friestad vs Travelers Indemnity Co.*, 452 Pa. 417 (1973); *Wilshire vs Penn Overall Supply Co.*, 227 Pa. Superior Ct. 30 (1974).

IV

By his 7th exception Respondent contends that the Court did not have jurisdiction to proceed as all interested persons did not appear.

Once again the issue seems more procedural than jurisdictional so that the issue is not properly before us, given the failure to object at an earlier point. Moreover, neither local municipalities nor the Department of Revenue have any interest or concern in whether the fund at issue is retained by Respondent or paid to Petitioner.

V

Respondent's 8th exception attacks the sufficiency of the petition contending that certain writings should have been attached.

This is obviously a procedural matter which must be raised preliminarily and has been waived.

VI

Respondent's 9th, 11th, 12th, 14th, and 16th exceptions take issue with the Court's declaration that Section 1555-2 of the County Code limits commissions payable to Respondent.

Respondent seeks to draw a distinction between commissions and fees, however, he went to great pains to emphasize in the stipulation of facts that this case deals with commissions and commissions are expressly covered by the statute. Respondent claims that there is a distinction between commissions received by county officers and commissions received by an agent of the Commonwealth or an agent of local municipalities. However, the statute limits all commissions received "from the Commonwealth of Pennsylvania and from any political subdivision." Commissions would not be payable if the county officer was not performing services and consequently an agent of the payer for the purpose of such work and compensation. In our view the language of the statute clearly applies and Respondent is reaching for distinctions not justified by the same. If the statute applies, as we believe that it does, then it is the duty of the Court to consider the act whether raised by counsel or not, and the limitation upon commissions is not at taking without due process of law but a restriction in accordance with such process.

VII

By his 13th exception Respondent objects to the terminology of the declaration which goes beyond a delineation of the rights of the parties to a direction to pay funds to implement the same.

We will modify the declaration to delete the language which directs as opposed to the language which defines.

VIII

In exception 15 Respondent excepts to the refusal of the President Judge to arrange for the appointment of a judge from another county to hear this matter.

We approve and adopt the Order which rejected such petition. It is clearly a discretionary matter. Respondent has failed to show any basis to conclude that this discretion was abused or that he was prejudiced by such refusal.

Consequently, subject to modification of the form of the declaration, these exceptions will be dismissed.

By the Court,

RICHARD E. KOHLER,
Richard E. Kohler, *President Judge.*

ALBERT G. BLAKEY, III,
Albert G. Blakey, III, *Judge.*

Dated: 8/27/76.

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COUNTY OF YORK,

vs.

ALLEN H. SMITH.

Civil Action - Law
No. 1 August Term, 1973
In Equity
(Filed August 27, 1976.)

APPEARANCES:

LEWIS P. STERLING, ESQUIRE, For the Petitioner.

ALLEN H. SMITH, ESQUIRE, For the Respondent.

ORDER

AND NOW, TO WIT, THIS 27th day of August, 1976, the declaration entered June 18, 1975, is modified to read as follows:

"The salary to which Respondent is entitled during his entire term of office is $11,160 per year. For the period November 1, 1971 through December 31, 1973, the sole period at issue in this litigation, petitioner is entitled to all commissions received by Respondent from the Commonwealth of Pennsylvania and any political subdivision

in excess of $7,500 in any calendar year. Respondent is entitled to retain commissions received or held in escrow not in excess of such limitation."

All of Respondent's other exceptions are overruled and dismissed. We grant the Respondent an exception.

By the Court,

RICHARD E. KOHLER,
Richard E. Kohler,
President Judge.

ALBERT G. BLAKEY, III,
Albert G. Blakey, III,
Judge.

db

APPENDIX II

Opinion of the Commonwealth Court of Pennsylvania, July 28, 1978

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

ALLEN H. SMITH,

Appellant,

v.

COUNTY OF YORK,

Appellee.

No. 9 T.D. 1977

BEFORE:
Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge
Honorable Richard DiSalle, Judge

ARGUED: February 28, 1978

Appendix II—Opinion of the Commonwealth Court of Pennsylvania, July 28, 1978.

OPINION

Opinion by Judge Crumlish, Jr.
Filed: July 28, 1978

Allen H. Smith (Appellant) appeals a declaratory judgment of the Court of Common Pleas which limits the total amount of commissions which he may keep as Recorder of Deeds for York County to $7,500.00 per year. He asserts that the use of an action for declaratory judgment to resolve this controversy was improper; that the court below should not have resolved this matter by referring to a law which had not been raised by the petitioner in his petition for a declaratory judgment and that in any event that the court below misconstrued the cited law; that all necessary parties were not joined and that the Judges who heard this case should have recused themselves. We disagree with all these contentions and affirm the court below.

The County of York (York) requested a declaratory judgment to determine the salary to which Appellant was entitled during the period from January 1, 1972 to December 31, 1973, and what portion of fees which he had collected incident to his job duties was properly his. York was prompted to bring this action because of certain changes in the Constitution of Pennsylvania[1] and a change in the County Code which provided a new salary schedule for county officers.[2] The court held that these changes did not affect Appellant because they took effect during his term of office and Article 3, Section 27 of the Constitution of the Commonwealth of Pennsylvania forbade the increase or decrease of salary during an office holder's term in office. The court's response to Appellant's first contention has not been appealed and therefore

is not before us. The court below then held that, pursuant to the Act of June 25, 1966, P.L. 1556, *as amended*, 16 P.S. § 1555-2 (1555-2), the amount which Appellant could retain from commissions which he collected in the course of duties was limited to $7,500 *per annum*. This has not been raised by York's petition for declaratory judgment, but the court nevertheless relied on the provisions of this Act because the matter had been formally presented to it for determination. York had specifically requested a decree as to the disposition of fees collected and held by Appellant but it had not raised the bearing of 1555-2. It is this application 1555-2 to Appellant from which Appellant appeals.

Relief by way of declaratory judgment was clearly proper in this case. Granting of relief by way of declaratory judgment is discretionary for the court where it "*is satisfied* that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation." Section 6 of the Uniform Declaratory Judgments Act, Act of June 18, 1923, P.L. 840, *as amended*, 12 P.S. § 836 (Act) (emphasis added). *See, e.g., Greenberg v. Blumberg*, 416 Pa. 226, 206 A.2d 16 (1965). Although the petition did not set forth with any specificity, the existence of an actual controversy or antagonistic claim[3] which indicates imminent and inevitable litigation, any deficiency was cured when Appellant joined in and raised no exceptions to a pre-trial order setting forth the facts necessary for the resolution of the petition. Looking to Appellant's conduct, the court could be satisfied that the requisite antagonistic claims and imminent litigation were present.

We disagree with the contention that the court below did not have the power to construe 1555-2 because it had not been

raised in the petition. It is our view that a petition for declaratory judgment is equitable in nature and when a court assumes jurisdiction, it has the power to render any relief which it considers necessary. Although our research reveals no Pennsylvania appellate decision so holding, there are abundant decisions in other jurisdictions to support this conclusion. The consideration of holdings in other jurisdictions is particularly appropriate to our deliberation because Section 15 of the Act, 12 P.S. § 845, provides:

> "§ 845. Uniformity of interpretation
>
> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees."

In Illinois, it was held in the case of *Richards v. Liquid Controls Corp.*, 26 Ill. App.3d 111, 130, 325 N.E.2d 775, 788 (1975), that

> "[I]n the process of reaching a result under a declaratory judgment action, the trial court is able to render any further relief necessitated by its deliberations. (La Salle Nat. Bank v. International Ltd. (1970), 129 Ill. App.2d 381, 398-399, 263 N.E.2d 506, Koziol v. Village of Rosemont (1961), 32 Ill. App.2d 320, 329, 177 N.E.2d 867)."

In Massachusetts, the Supreme Judicial Court has held that "[t]he final decree should have determined the whole controversy between the parties and should have left for future determination no issue *reasonably raised by the bill and prayers*

for relief, including the prayer for general relief." *Visce v. Gottfried,* 353 Mass. 568, 238 N.E.2d 759, 760 (1968) (emphasis added). *See also Frank J. Rooney, Inc. v. Charles W. Ackerman of Florida, Inc.,* 219 So. 2d 110 (1969).

In view of the liberal construction accorded this Act[4] and the request by York in its petition for a determination as to the disposition of commissions collected and held by Appellant, we have no hesitation in holding that the court below had the power to apply Section 1555-2.

There is no question that Section 1555-2 is applicable to Appellant. That section states:

> "§ 1555-2. Commissions from Commonwealth and political subdivisions
>
> "Each county officer shall pay all commissions received by him from the Commonwealth of Pennsylvania and from any political subdivision in excess of seven thousand five hundred dollars ($7,500) in any calendar year, to the general fund of the county for the use of the county."

Even though the term "county officer" is no where specifically defined, Section 1550 of the Code, which designates the salary to be paid "county officers" includes Appellant. It is beyond question that this section is specifically designed to control the amount of fees retained by all county officers including Appellant.

The remaining issues raised by Appellant are wholly without merit since all necessary parties were joined in this action. The court did not err in refusing to withdraw itself from the trial because it was involved in a litigation with the

Commissioners of York County, the petitioners hereto. Appellant made no allegation that it had any interest "that could be substantially affected by the outcome of the proceedings."[5] Appellant simply alleged the existence of the litigation between the Judges and the commissioners.

Accordingly, we

ORDER

AND NOW, this 28th day of July, 1978, the order of the Court of Common Pleas of York County is affirmed.

JAMES C. CRUMLISH, JR.,
James C. Crumlish, Jr.,
Judge.

Footnotes

[1] On April 23, 1968, Article 9, Section 4 of the Constitution was amended to provide that as of April 23, 1972, fees incidental to the conduct of a county office would be paid directly to the county or the Commonwealth of Pennsylvania.

[2] The Act of November 1, 1971, P.L. 495, *as amended,* 16 P.S. § 11011-6, set forth a new salary schedule for Recorder of Deeds.

[3] Section 6(1) of the Act, 12 P.S. § 836(1).

[4] Section 12 of the Act, 12 P.S. § 842.

[5] Canon 3c(1) of the Code of Judicial Conduct.

Appendix II—Opinion of the Commonwealth Court of Pennsylvania, July 28, 1978.

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

ALLEN H. SMITH,

Appellant,

v.

COUNTY OF YORK,

Appellee.

No. 9 T.D. 1977

ORDER

AND NOW, this 28th day of July, 1978, the order of the Court of Common Pleas of York County is affirmed.

JAMES C. CRUMLISH, JR.,
James C. Crumlish, Jr.,
Judge.

CERTIFIED FROM THE RECORD
JUL 28 1978
FRANCIS C. (ILLEGIBLE)
Chief Clerk

APPENDIX III

Opinion of the Supreme Court of Pennsylvania, December 29, 1978

SUPREME COURT OF PENNSYLVANIA
Middle District

Sally Mrvos
Prothonotary
Mildred E. Williamson
Deputy Prothonotary

P. O. Box 624
Harrisburg 17108

December 1, 1978

Allen H. Smith, Esquire
47 North Duke Street
York, Pa. 17403

Re: Allen H. Smith, Petitioner v. County of York
No. 393 Allocatur Docket

Dear Mr. Smith:

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

"November 29, 1978

Petition Denied

Per Curiam."

Very truly yours,

MILDRED E. WILLIAMSON, se
Deputy Prothonotary.

cc: Lewis P. Sterling, Esquire

Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-1312

ALLEN H. SMITH,

Petitioner,

vs.

COUNTY OF YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LEWIS P. STERLING
Attorney for Respondent

48 South Duke Street
York, Pennsylvania 17401
(717) 854-3886

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 25F, PHILADELPHIA, PA. 19103
PHONE: (215) 568-7765

INDEX.

	Page
Argument	1
I. Was Petitioner deprived of due process when the local Court Judges failed to recuse themselves, and the local Court failed to give Petitioner a hearing on the issue of disqualification?	1
II. Did the Court err in interpreting Section 1555-2 of the County Code so as to apply to agents, when the statute used the term County officers, and in so doing impaired the obligation of existing contracts between the Petitioner and the State and Local Municipalities?	3
III. Did the Appellate Court deprive the Petitioner of substantive due process in determining that the local Court had jurisdiction of a declaratory judgment proceeding?	4
Conclusion	5

CASES CITED.

Frestad v. Travelers Indemnity Co., 452 Pa. 417 (1973)	5
Wallace v. Jameson, 179 Pa. 98	2
Wilshire v. Penn Overall Supply Co., 227 Pa. Superior Ct. 30 (1974)	5

STATUTES.

Act of July 25, 1963 (Declaratory Judgment Act) P.L. 305, 12 Purdon's Statutes 831, as amended	5
Act of January 25, 1966, P.L. 1556, Section 3, which added Section 1555-2 to the County Code (16 Purdons Statutes 1555-2)	3

IN THE

Supreme Court of the United States

No. 78-1312

ALLEN H. SMITH,

Petitioner,

vs.

COUNTY OF YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ARGUMENT

I. Was Petitioner deprived of due process when the local Court Judges failed to recuse themselves, and the local Court failed to give Petitioner a hearing on the issue of disqualification?

On May 7, 1973 the Respondent, County of York, filed its Petition for Declaratory Judgment in this case. The Petitioner, Allen H. Smith, filed a Petition requesting that a jurist from outside York County preside specially in this case stating that since he was a former County official and the fact

that the York County Judges were involved in litigation with the County Commissioners that it would be appropriate for the Judges of York County to have a jurist from another County preside.

The President Judge of York County Common Pleas Court handed down an order on November 24, 1974 stating that the Petitioner had not alleged sufficient facts to require all members of the Court to disqualify themselves in this case, no such request having been made by the Petitioner and no prejudice to either party appearing, the prayer of the Petition was refused and the Court directed that the case be decided by a panel of at least two (2) judges of the York County Courts. An exception was noted for the Petitioner; however, no appeal was taken nor was argument requested on the exception by the Petitioner.

The Petitioner failed to appeal the Order of the Court even though an exception was granted him. In addition, the Petitioner failed to show that the York County Judges had interest bias or prejudice and the Appellate Courts in Pennsylvania have consistently held that if the judge feels he can hear and decide a case fairly and without prejudice, his decision will be final unless there is an abuse of discretion (See *Wallace v. Jameson*, 179 Pa. 98).

The Petitioner having failed to meet the requirements as set forth by the Appellate Courts and having failed to request a hearing and not having taken an appeal, the Petition should be dismissed.

II. Did the Court err in interpretating Section 1555-2 of the County Code so as to apply to agents, when the statute used the term County officers, and in so doing impaired the obligation of existing contracts between the Petitioner and the State and Local Municipalities?

The Petitioner assumes a fact that is not of record or in existence in that there were no contracts with him or anyone else.

The Petitioner by virtue of being the elected Recorder of Deeds, collected monies for transfer stamps required on deeds by virtue of action of the Pennsylvania Legislature and ordinances enacted by officials of the various local municipalities in York County.

The Act of January 25, 1966, P. L. 1556 Section 3, which added Section 1555-2 to the County Code (16 Purdons Statutes 1555-2) provides as follows:

> "Each County officer shall pay all commissions received by him from the Commonwealth of Pennsylvania and from any policital subdivision in excess of Seven Thousand Five Hundred ($7,500.00) Dollars in any calendar year to the general fund of the County for the use of the County."

Petitioner claims there is a distinction between commissions received by County officers and commissions received by an agent of the Commonwealth or an agent of local municipalities. However, it is to be noted that the statute limits all commissions received "from the Commonwealth of Pennsylvania and from any political subdivision."

Commissions would not be payable if the County officer was not performing services and consequently an agent of the payer for the purpose of such work and compensation.

The language of the statute applies to the Petitioner and it is clear that he is reaching for distinctions that have no justification in law or fact.

Since the statute applies to the Petitioner, it becomes the duty of the Court to consider this act, and the limitation upon commissions is not a taking without due process of law, but a restriction in accordance with such process.

III. Did the Appellate Court deprive the Petitioner of substantive due process in determining that the local Court had jurisdiction of a declaratory judgment proceeding?

Relief by way of declaratory judgment was proper in this case. The Respondent filed a Petition for Declaratory Judgment to determine what portion of fees of which the Petitioner had collected was properly his. While admittedly the Petition did not set forth specifically the existence of an actual controversy or antagonistic claim, such deficiency was cured by the Petitioner's conduct when he failed to file Preliminary Objections to the Complaint and raised no exceptions to the pre-trial order of the Lower Court which set forth the facts necessary for the resolution of the Petition.

The Appellate Court looking at Petitioner's conduct was satisfied that the requisite antagonistic claims and imminent litigation were present.

The right of the Respondent to obtain a Declaratory Judgment was only objected to when the Petitioner filed exceptions to the Opinion and Declaration of the Lower Court.

To the extent that this objection is procedural, the Petitioner has waived the same by failing to file any objections until after the declaration was filed. To the extent

that these exceptions question jurisdiction, which cannot be waived, they must be overruled in that the Appellate Courts in construing the Declaratory Judgment Act (Act of July 25, 1963, P.L. 305, 12 Purdon's Statutes 831, as amended) has consistently held that the statute was intended for the purpose of settling uncertainty and insecurity with respect to rights, status and other legal relations of the parties. See *Frestad v. Travelers Indemnity Co.*, 452 Pa. 417 (1973); *Wilshire v. Penn Overall Supply Co.*, 227 Pa. Superior Ct. 30 (1974).

Conclusion

The Petitioner having failed to raise any constitutional questions, the request for a Writ of Certiorari should be denied.

Respectfully submitted,

LEWIS P. STERLING,
Attorney for Respondent.